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2
3 UNITED STATES DISTRICT COURT
4 EASTERN DISTRICT OF WASHINGTON

5
6 UNITED STATES OF AMERICA,

7 Plaintiff,

8 v.
9

10 ROBERT M. WAGGY,

11 Defendant.
12

No. 2:16-PO-00198-JTR-1

ORDER MEMORIALIZING
RULING ON MOTION

13 This matter came before the Court for hearing pursuant to Defendant's FED.
14 R. CRIM. P. 29 Motion and Motion for Acquittal. ECF No. 124. This Court held a
15 hearing on the motion on September 26, 2017. Defendant was present, out of
16 custody, with Assistant Federal Defender Benjamin Flick and Assistant Federal
17 Defender Daniel N. Rubin. Assistant United States Attorney Timothy J. Ohms
18 represented the United States.

19 Defendant's Rule 29 motion is directed to the sufficiency of the evidence in
20 Count 3, specifically whether at the close of the government's evidence there was
21 sufficient evidence for a finder of fact to determine beyond a reasonable doubt that
22 Defendant violated the statute. Defendant argues that his use of the "F word" is
23 protected speech, and cannot be punished as criminal conduct.

24 Defendant's separate motion for judgment of acquittal on Counts 3 and 4
25 similarly sounds in the right of free speech, and urges the Court to find that both
26 Defendant's vocabulary and the opinions espoused were constitutionally protected,
27 and that therefore the First Amendment prohibits using these statements to support
28 a criminal conviction.

1 This is an assimilated crimes case. Accordingly the Court has considered
2 the Wash. Rev. Code § 9.61.230, which is the “telephone harassment” statute
3 defendant is charged with violating. The Court has also considered the evidence
4 presented to the jury at trial, and the briefs and argument of counsel. The Court
5 has previously, and again here, notes that the statute does not punish speech *per se*,
6 but rather *conduct* and *intentions* which may be, but are not required to be,
7 evidenced by spoken words.

8 Accordingly Defendant’s First Amendment arguments must fail. The Court
9 finds that the evidence regarding Count 3 of the Second Amended Information is
10 sufficient for a jury to find guilt beyond a reasonable doubt, and is not
11 Constitutionally infirm. Wash. Rev. Code § 9.61.230 is not unconstitutional as
12 applied to Defendant.

13 **IT IS ORDERED**, that Defendant’s motion, **ECF No. 124**, is **DENIED**.

14 DATED October 2, 2017.



A handwritten signature in black ink, appearing to be "M", is written over a horizontal line.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE